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NY, Calif. Laws Discrimination Lawyers Should Watch In 2022

By **Vin Gurrieri**

Law360 (January 3, 2022, 12:03 PM EST) -- While President Joe Biden brought a pro-worker attitude to the White House, progressive states like New York and California remain on the cutting edge in providing legal protections for employees and, increasingly, for independent contractors.

Here, Law360 looks at three new laws in New York and California that attorneys should keep an eye on in 2022.

California Tightens Limits on NDAs

In late September, California Gov. Gavin Newsom signed a law that further rolls back the ability of companies in that state to insist on having nondisclosure agreements as part of discrimination settlements.

S.B. 331, known as the Silenced No More Act, broadens existing restrictions on the use of NDAs in sexual harassment settlements to cover a wider range of employment and housing-related deals under California's Fair Employment and Housing Act.

The statute, which applies prospectively to deals struck after Jan. 1, 2022, bars NDAs in settlements resolving legal actions that assert workplace discrimination, harassment and retaliation claims not based on sex, as well as claims that bias and harassment were committed by the "owner of a housing accommodation."

The law also prevents employers from inserting confidentiality clauses into certain severance agreements that limit a worker's right to disclose actions at their former workplace that they believed to be unlawful, unless the worker wants such a provision included.

Eric Akira Tate, co-chair of Morrison & Foerster LLP's global employment and labor practice, said it is going to be difficult for employers to keep the underlying facts of any disputes that fall under the ambit of S.B. 331 confidential. But he noted that the law still allows for confidentiality in settlement agreements under certain circumstances.

"The legislature has maintained the ability for a victim of sexual assault or discrimination or harassment in the workplace … to shield his or her or their identity," Tate said. "So that is something that can remain confidential. The amount of any settlement that might be paid to the victim or the claimant … is [also] something that is still lawful to have maintained as confidential."

While Tate said there may be some ambiguities within the law's text, the statute will have a significant impact on businesses and workers alike. While S.B. 331 may have been intended by its terms to apply to discrimination and harassment, it in fact "may impact and apply, or at least be argued to apply to, a broader scope workplace disputes," he said.

"Wrongful termination, for example. It wouldn't be uncommon to say, 'Okay, you wrongfully terminated me, but it's because of my race, my gender [or] because I took a leave of absence.' There [are] just a number of other things that somebody could throw into the mix and potentially bring that dispute under the coverage of S.B. 331," Tate said.

"The game has sort of changed in a marked way for employers and employees that are trying to resolve discrimination and harassment disputes," Tate added.

NYC Takes Aim at Bias in Job-Screening Tools

New York City in 2021 waded into the burgeoning issue of tech-based employment discrimination, enacting legislation that will soon require city-based businesses to perform a bias audit ahead of using automated hiring tools and tell job candidates how the technology works.

Known officially as Int. 1894-2020, the legislation was overwhelmingly passed by the New York City Council in November and lapsed into law a month later after it went unsigned by Mayor Bill de Blasio. It is scheduled to take effect on Jan. 1, 2023.

Although employers have a year before the law takes effect — and, in the meantime, are busy addressing numerous issues tied to the ongoing COVID-19 pandemic — they should still use the year-long lead time to make sure they are ready for 2023 if they want to continue using automated screening tools, according to Julie Levinson Werner, a partner at Lowenstein Sandler LLP.

"I wouldn't tell people to panic and to say that this has to be their top priority, but certainly for larger organizations or … recruiters or staffing agencies, [knowing] how all this stuff works under the hood. ... Obviously, that's not going to be something that could just be done overnight," Werner said.

One of the law's core tenets is that employers and employment agencies must perform a "bias audit" on automated employment decision-making and screening tools that are used for hiring and promotions within a year of them being used. Before an automated tool is rolled out, businesses must also post on their websites a summary of the results of the bias audit, a term defined in the bill as an "impartial evaluation" of those tools "by an independent auditor."

The law also requires businesses to notify any applicant "who resides in the city" both that an automated tool will be used and what criteria it will take into account to weed out applications for promotions or jobs. Those notices must be provided at least 10 days before the tool is used, and job candidates will have a chance to ask for an "alternative selection process" or accommodation. Companies found to be in violation of the law would face monetary civil penalties.

Werner said the first thing she believes employers should do is "get a handle on what tools employers are using as part of their recruiting practice to even see whether the law is implicated. That includes having a talk with any product vendors to make sure those vendors know about the law and what they are doing in response to the new rules.

Additionally, one of the open questions with the law is what exactly the city means by "independent audit" and whether the responsibility for performing one should fall on employers themselves or whether the manufacturers or vendors of programs have to perform that exercise, Werner said.

"I do think it'll be interesting over the course of the year to find out what independent steps the vendors are taking to do a bias audit with respect to their product," Werner said. "And then I would like to think or hope that employers will be able to rely upon that independent audit."

Over the course of the next year, the city could also issue additional compliance guidelines that flesh out the law's requirements in greater detail, including clarification about what AI product vendors can do to satisfy the law's obligations on behalf of customers that buy their programs, Werner added.

"I guess the law currently gives the impression that the employer has this responsibility [and] that doesn't seem practical to me," she said. "I think the benefit of some time and some guidance to the extent the city could clarify how an employer could satisfy this by relying upon an independent audit, obtained by the vendor, I think would be in everybody's best interest.

New York State Bolsters Whistleblower Safeguards

Not long after a harassment scandal felled Andrew Cuomo, New York Gov. Kathy Hochul signed a bill into law that enhances legal safeguards for workers in the state who report unlawful or dangerous conduct by their employers.

The law, which takes effect on Jan. 26, 2022, expands the scope of the state's existing whistleblower protection statute by changing the definition of "employee" to cover people who no longer work for a company, as well as independent contractors who may potentially be retaliated against after their employment ends.

The updated law — known as S.4394-A and A.5144-A as it worked its way through the state Legislature — also broadened the types of actions that can be deemed retaliatory to include things like a business threatening to get a former employee fired from their current job, threatening to contact immigration authorities or otherwise hurting someone's job prospects.

The measure signed by Hochul also allows people to recover punitive damages if an employer is found to have flouted the statute in a "malicious or wanton" manner, and it lowers the legal bar employees need to meet in order to prove that they were unlawfully retaliated against.

Under the new law, workers have to show only that they "reasonably believe" an employer committed an unlawful action or did something that created a specific danger to public health or safety. It replaces a standard that required employees to show that an actual violation of law took place that created substantial danger in order for anti-retaliation protections to be triggered, according to a description of the law from the governor's office.

Mark Goldstein, a New York-based partner at Reed Smith LLP, said the law's been broadened in notable ways and goes further than a similarly employee-friendly statute in place in neighboring New Jersey.

"This expansion of the state whistleblower law could have a really substantial impact on employment litigation in New York State," Goldstein said, pointing specifically to the fact that the updated law covers

independent contractors as well as a company's current and former employees and expands the scope of protected activity that receives legal protection.

"Essentially, [it] protects workers who report any actual violation of law or any violation of law be perceived in good faith," Goldstein said. "It's an extremely broad law. Undoubtedly, we will see years of litigation to determine the precise scope and parameters of law, but as drafted the amendment...is extremely broad."

--Additional reporting by Lauren Berg and Amanda Ottaway. Editing by Nick Petruncio.
